

F3PQSECC - Corrected

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 SECURITIES AND EXCHANGE
5 COMMISSION

6 Plaintiff

7 v.

8 13 CV 2575 (GBD) (JCF)
9 Argument

10 GIBRALTAR GLOBAL SECURITIES,
11 INC., WARREN DAVIS

12 Defendants

13 -----x
14 New York, N.Y.
15 March 25, 2015
16 10:00 a.m.

17 Before:

18 HON. JAMES C. FRANCIS IV

19 Magistrate Judge

20 APPEARANCES

21 U. S. SECURITIES AND EXCHANGE COMMISSION
22 Attorneys for Plaintiffs
23 KEVIN P. O'ROURKE
TODD BRODY
CHRISTOPHER INNIS

24 DeFEIS, O'CONNELL & ROSE PC
25 Attorneys for Defendants Gibraltar & Davis
PHILIP CANNING PATTERSON

26 PECKAR & ABROMSON PC
27 Attorney for Defendant Carrillo
28 BRADLEY SUSSMAN

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, state your name for the
3 record.4 MR. O'ROURKE: Kevin O'Rourke on behalf of plaintiff
5 Securities and Exchange Commission.

6 THE COURT: Good morning.

7 MR. INNIS: Christopher Innis.

8 MR. BRODY: Todd Brody on behalf of the Securities and
9 Exchange Commission in the combined discovery case.10 MR. PATTERSON: Philip Patterson, DeFeis, O'Connell &
11 Rose for Davis and Gibraltar. Good morning, your Honor.12 MR. SUSSMAN: For Louis Carrillo, Bradley Sussman from
13 the law firm of Peckar & Abramson.

14 THE COURT: Good morning.

15 We have two things on the agenda in Gibraltar. We
16 have the pending motion with respect to the documents, and we
17 have the issue of the sites of the depositions. We don't
18 technically have anything on the agenda in Carrillo, but what I
19 would like to do at the end is take stock of where we are and
20 see what is pending and what the briefing situation is there.

21 I am happy to hear first from the movant in Gibraltar.

22 MR. PATTERSON: Thank you, your Honor. Here or at the
23 lectern?

24 THE COURT: Your choice.

25 MR. PATTERSON: OK. I'll stay here.

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1 I think it would be worthwhile just to take a moment
2 and explain how we got to this point. It's in our filings, but
3 I think it is relevant to the legal arguments, and, frankly, it
4 may benefit our audience here.

5 Gibraltar, of course, is a Bahamian broker-dealer
6 owned by Warren Davis. Back in 2010, the SEC's Washington D.C.
7 office and the SEC's New York office were both conducting
8 investigations. In 2010, in the course of those
9 investigations, they requested documents from Gibraltar via its
10 regulator in the Bahamas, which is the Securities Commission of
11 the Bahamas, the SCB.

12 For the D.C. office, apparently they were primarily
13 focused on a stock called Magnum d'Or, MDOR, an alleged
14 pump-and-dump involving Magnum d'Or. For the New York office,
15 I understand they're primarily interested in two stocks named
16 Trade Show and Pacific Blue.

17 Fast forward to 2011. The SEC's Florida office
18 commences an action in federal court in Miami, an enforcement
19 action against the alleged perpetrators of the Magnum d'Or
20 pump-and-dump. In fact, in that complaint, Gibraltar is in
21 fact mentioned as the transactions allegedly at one point went
22 through Gibraltar. Gibraltar was not named. Davis was not
23 named in that action in Florida in 2011, and that action was
24 concluded, I understand, by 2012.

25 Fast forward to the summer of 2012. Gibraltar

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1 appoints a liquidator under Bahamian law. Its board votes to
2 appoint a liquidator. I think the simplest analogy is it's
3 akin to a bankrupt trustee in the U.S. Of course, what you are
4 going to hear from the SEC is that part of that process is
5 Gibraltar's regulator, the SCB, has to accept the surrender of
6 Gibraltar's registration to complete the liquidation process.
7 But from the moment, the point being Gibraltar appoints a
8 liquidator, it closes down its business, and its 20 employees
9 are out of work.

10 Now fast forward to the spring of 2013, and the two
11 SEC offices determining to commence their actions against
12 Gibraltar and Davis in the D.C. case and against Gibraltar and
13 Davis and others in the Carrillo Heuttel New York case, but
14 they essentially waited until Gibraltar was closed down and
15 attempting to go into liquidation before bringing the action.

16 We went through motions to dismiss. We went through
17 initial disclosures. As part of the initial disclosure process
18 beginning about a year and a half ago, we raised the issues
19 that are before us today, at least with respect to the
20 documents, to the SEC. We told them that there is this issue
21 of control or lack thereof over the documents by Gibraltar. We
22 told them about the liquidator. We told them about the
23 confidentiality issue which I can go into in a moment, about
24 the confidentiality of Gibraltar's clients. We repeatedly
25 proposed resolutions to this in the form of exchange of

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1 Bahamian legal opinions. To date, I have not seen an opinion
2 from the SEC by someone who is knowledgable in Bahamian law on
3 the subjects. We also during that year and a half long process
4 suggested to the SEC some workarounds, first and foremost being
5 a request for international channels. Gibraltar and Davis
6 throughout this were advised by Bahamian counsel. I understand
7 from Bahamian counsel that the SEC in the past has made
8 international requests to the Bahamas. They work. It's a
9 process of months rather than years. We suggested the SEC that
10 if they pursued that, it might have resolved the issues that
11 we're talking about. And the issue that we're talking about is
12 Gibraltar is essentially stuck in a Catch 22. According to
13 Bahamian counsel, you have the declaration from Raynard Rigby,
14 who is a well-credentialed, well-respected member of the bar in
15 the Bahamas, he says that when Gibraltar appointed a
16 liquidator, when the board appointed a liquidator, the board
17 ceased to function, and at that point they did, according to
18 Bahamian counsel, everything that Gibraltar was supposed to do
19 to get the SCB to accept the surrender of their registration.

20 THE COURT: Let's stop there for a second. Mr. Rigby,
21 I take it, is Bahamian counsel to Gibraltar.

22 MR. PATTERSON: He is.

23 THE COURT: So we don't have an outside expert's
24 affidavit with respect to Bahamian law.

25 MR. PATTERSON: Not an objective expert, if that's

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1 what your Honor is referring to.

2 THE COURT: I am.

3 The second question is, you said that they've done
4 everything they have to do. Is it not true that one per
5 requisite for their going to liquidation is the approval of the
6 SCB?

7 MR. PATTERSON: This is why -- and, again, I'm
8 operating on the advice of Bahamian counsel -- it's a Catch 22.
9 There is actually another attorney, although he didn't provide
10 a formal affidavit. Mr. Sean Moree provided a letter, and he
11 says the same thing, which is, when the board voted to appoint
12 the liquidator, control over Gibraltar vests in the liquidator
13 the board ceases to function.

14 As a practical matter, another problem here is the
15 SEC, despite beginning these investigations in 2010 -- and I
16 forgot to mention that in 2010 -- maybe I did mention it -- the
17 SEC did get documents from Gibraltar via Gibraltar's regulator.
18 They made a request of the Securities Commission of the Bahamas
19 which passed it on to Gibraltar. Gibraltar to my knowledge
20 produced everything the SEC wanted. They could have asked for
21 these documents back then when Gibraltar was alive, frankly.

22 In 2011 they had an action in Florida against the
23 alleged MDOR pump-and-dumpers. Gibraltar is mentioned I think
24 in paragraph 20 of the complaint. They could have subpoenaed
25 documents at that point. They didn't. They waited. We're now

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1 in year five. They waited about three years until Gibraltar
2 was out of business. As a practical matter, that also
3 complicates the issue of control. As a legal matter, Bahamian
4 counsel advises that when the board appointed a liquidator,
5 that's it, the board no longer has authority. As I say, it's
6 really a Catch 22. The Securities Commission of the Bahamas
7 did not provide any reason why they are refusing to accept the
8 surrender of Gibraltar's registration. Gibraltar has an action
9 down there. They're trying to get clarity on this. They seem
10 to be the only entity that is trying to get clarity on it.

11 THE COURT: An action which apparently they are not
12 pushing forward, according to the recent submission.

13 MR. PATTERSON: I was handed that about ten minutes
14 ago. The first thing I'd note is, like the declaration that
15 the SEC relies on, it's essentially hearsay. It's by someone
16 who is describing what counsel for the SCB is telling them, but
17 all I can say is that Bahamian counsel has told me that the
18 reason for the delay here is that's the way Bahamian courts
19 move.

20 I asked him again yesterday when might this go to
21 trial. He said it might go to trial by the end of 2015.
22 According to him, that's the way the world moves down there.
23 That's all I can say.

24 I haven't had a chance to review this. I haven't had
25 a chance to run this by Bahamian counsel. I really can't speak

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1 to it except to point out again that apparently it's hearsay.

2 Anyway, the punch line of all this is we raised these
3 issues a year and a half ago. Gibraltar is simply not in a
4 position to produce these documents. I think when we had the
5 premotion conference on this motion, my colleague attended. I
6 think Mr. O'Rourke attended. I believe at that conference your
7 Honor may have asked has anybody tried to talk to the
8 liquidator on all of this.

9 So, once your Honor set the briefing schedule, I
10 picked up the phone and I called the liquidator. I'll be
11 completely honest, I didn't want to do it repeatedly, and I
12 didn't want to do it at length because I didn't want the SEC to
13 subsequently say that I was trying to steer the liquidator one
14 way or the other; but I can tell you this: It was a very brief
15 conversation. The word the liquidator used without prompting
16 was purgatory. He said Gibraltar is in purgatory, and he's not
17 comfortable doing anything until they get some clarity on the
18 legal situation.

19 The irony here is if the Securities Commission of the
20 Bahamas simply accepted the surrender of Gibraltar's
21 registration -- and I understand their refusal was
22 unprecedented, or virtually unprecedented -- there's no issue.
23 We have clarity, the liquidator is in control, and the SEC can
24 just go to the liquidator.

25 This is not a stalling tactic by Gibraltar and Davis.

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1 It's a result of the fact that SEC waited until the company was
2 dead before seeking these documents, and it's a result of the
3 fact that the Securities Commission of the Bahamas has done
4 something with no explanation that apparently is unprecedented.
5 And Gibraltar is trying to vindicate itself on these issues and
6 get clarity. If they succeed -- I guess because it's the
7 Bahamas, it's going to take time, but if they succeed, then
8 apparently the SEC can just seek the documents from the
9 liquidator.

10 It's not a stalling tactic. It's not strategy, as
11 the SEC has accused me of many times in the past. We propose
12 workarounds in good faith. We sent them Bahamian legal
13 opinions.

14 Actually, the SEC New York office is here, and I think
15 at this very moment, they're making a Hague Convention request
16 in the companion Carrillo Heuttel case for documents in the
17 Caribbean. I think in that instance it's Barbados. Bahamian
18 counsel informs me that the SCB does this all the time in the
19 Bahamas and that it would resolve some, if not all, of the
20 issues.

21 THE COURT: The difference in Carrillo is those are
22 third-party documents. Isn't that correct?

23 MR. PATTERSON: Fair enough. As I say, Bahamian
24 counsel advised me that this mechanism works in the Bahamas.

25 Do you want me to get into the deposition issue or

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1 should we stick with documents?

2 THE COURT: Let's stick with documents.

3 MR. PATTERSON: Nothing further.

4 THE COURT: Thank you.

5 MR. O'ROURKE: Thank you, your Honor.

6 Just a few points, a couple of things from their reply
7 brief, if I could. As you know, we did submit a full brief in
8 opposition. I think we've covered all the issues. I would
9 emphasize that a party relying on a foreign law to avoid
10 production of documents bears the burden of proving that such a
11 law exists and that it prohibits production of documents. We
12 haven't seen one regulation or one statute in the Bahamas that
13 prohibits production of documents here. They've totally failed
14 to meet their burden and they should be ordered to produce the
15 documents.

16 Secondly --

17 THE COURT: Let's stop there. When we say prohibits
18 them, if Mr. Patterson's reading is correct and Mr. Davis and
19 Gibraltar are without the authority to produce the documents --
20 they may not be prohibited, but isn't the effect the same?

21 MR. O'ROURKE: Don't have the authority? Well, your
22 Honor, if your Honor orders them, there's nothing to preclude
23 them from producing the documents. They're a party here. The
24 court has jurisdiction over them. If they choose to not follow
25 the laws of this court, that's their choice.

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1 THE COURT: But if they lack the possession, custody
2 and control, how could they follow the orders of this court?

3 MR. O'ROURKE: But their basis for arguing they don't
4 have possession, custody or control is that the so-called
5 liquidator has the documents, but that liquidator is null and
6 void. The liquidation is null and void. As your Honor knows,
7 we pointed that out in detail, and that actually gets to my
8 second point in their reply brief. Not just once but twice
9 accused me of relying on the plain language of the statute.
10 Now, that is -- not just once but twice. In my 27 years of
11 practice at the SEC and a few years before that, no one ever
12 accused me of relying on the plain language of the statute.
13 I'm usually accused of not having a statutory basis or trying
14 to expand the statute, but here I'm accused of relying on the
15 plain language of the statute. What more do you need, your
16 Honor? The plain language of the statute says that they have
17 to get approval of the Securities Commission of the Bahamas
18 before they could go into liquidation, and they didn't do that,
19 your Honor.

20 Now, Mr. Patterson laid out some of the background of
21 this case, but he left out a very important element. First of
22 all, in Mr. Rigby's declaration, he points out in paragraph
23 seven, he says, "It must also be noted that on the 29th of
24 August 2012, GSSI passed a resolution dissolving the company by
25 appointing a liquidator."

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1 Now, we know that they -- it never got approval from
2 that liquidator, and the new declaration that we did submit
3 this morning from the executive director of the Bahamian
4 Securities Commission, Christina Rolle points out that they did
5 need to obtain authorization of SCB, and they didn't get that
6 authorization. And, in fact, the SCB wasn't told until months
7 later, if not significantly longer than that, that they even
8 purportedly went into liquidation. They didn't get the
9 authorization. They didn't even inform the SCB.

10 But let's go before that. August 29, 2012 when
11 Mr. Patterson laid out his summary. What he didn't point out
12 was the day before, August 28, there's an established procedure
13 well-known securities in law called a Wells notice that the SEC
14 staff gives to people, when the SEC staff is recommending an
15 enforcement action to the commission. They can submit a Wells
16 statement make their arguments.

17 The day before they went into supposed litigation,
18 they received a Wells notice from the SEC staff that an action
19 was going to be recommended. In fact, the Wells Commission was
20 then submitted on December 17, 2012 by DeFeis O'Connell & Rose.
21 And at the very start of that -- just so there is no ambiguity,
22 the very beginning says, "We make this submission on behalf
23 Warren Davis and Gibraltar Global Securities, Inc. in response
24 to the August 28, 2012 and November 20, 2012 Wells notices sent
25 by the staff of the division of enforcement. So, the very day

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1 before they were told that an enforcement action is going to be
2 recommended against both Mr. Davis and Gibraltar. And what did
3 they do the next day? They went in and passed a resolution
4 dissolving the company and appointing a liquidator, the
5 functional equivalent to a bank robber running down the street,
6 your Honor. They knew they were going to likely be sued, and
7 they go into liquidation or they claim they went into
8 liquidation but they didn't, because they didn't get authority
9 to do it and they didn't as a new declaration filed in the case
10 in the security -- that Gibraltar brought in the Bahamas
11 indicates the securities commission didn't even know that they
12 purported to be in liquidation. Mr. Patterson conveniently
13 left that piece of history out.

14 Another point, your Honor, in their reply brief not
15 having a basis that they can point to in the statute of
16 regulation claim that there's a commonlaw prohibition; not a
17 criminal prohibition, but a civil prohibition. We cited the
18 *Renert* case from Connecticut. They held no commonlaw
19 prohibition in the Bahamas. I even refer to the *Tournier* case.
20 I am probably not pronouncing it correctly. And said that
21 applies -- as we pointed out, that applies to banking
22 institutions.

23 Now, defendants haven't cited a single Bahamian case
24 that both *Tournier* applies to broker-dealers in the Bahamas.
25 Not a single. They even haven't cited a case that it applies

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1 to broker-dealers in jolly old England, but they did under a
2 Westlaw said they found dicta in two Australian cases that had
3 nothing do with broker-dealers. They only dealt with the
4 subject of a solicitor's confidentiality obligations.

5 For instance, one of the two authorities was a
6 solicitor who represented a husband and wife. It was a family
7 court case. It was held that the solicitor could not
8 thereafter represent the wife against the husband or vice
9 versa. That was the content. It had nothing to do with a
10 broker-dealer, and any of the reference to *Tournier* was
11 strictly dicta.

12 They knew that that wasn't enough. So what they did
13 do? They went and also found an Australian Law Review article.
14 Again, nothing from England or other parts of the commonwealth,
15 certainly nothing from the Bahamas. But they found a part of a
16 paragraph from an Australian Law Review article. The quote was
17 "The rationale in *Tournier's* case for applying the contractual
18 duty of confidentiality in a commercial bank/customer
19 relationship is applicable to a wider group of financial
20 institutions."

21 Let's go on because that which they left out is
22 telling. "There is a strong argument that bank confidentiality
23 is not limited to commercial banks but also applicable to other
24 financial institutions seeking deposits from customers. It has
25 been held that there is an implied include duty of

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1 confidentiality between credit unions and customers, and that,
2 arguably, a similar duty is applicable to building societies
3 and merchant banks." That was the rest of the paragraph. So
4 you're still -- this law review article was talking about
5 extending *Tournier* to depository type institutions, not
6 broker-dealers, and they cited nothing to support application
7 of the *Tournier* case to broker-dealers, your Honor. So that
8 provides them with no support.

9 Now, they also told you, as your Honor referred to,
10 that the Bahamian case filed down there that they want you to
11 wait for is just waiting for a case management conference. In
12 fact, the indications are they have not been prosecuting at
13 all. It did come on -- the government down there I'm told
14 brought a motion for failure to prosecute that came on a few
15 weeks ago, but then the judge recused himself from knowing a
16 party. So that is still pending, I'm told, and a new judge
17 hasn't yet been appointed. Who knows how long that is going to
18 go on for.

19 This case certainly should not wait for that. Because
20 the ruling in the Bahamas case -- the application of law in the
21 Bahamas is that they don't have the authority of the securities
22 commission to liquidate. So that is the law in the Bahamas.
23 They're trying to obtain a different interpretation of the law,
24 but, your Honor, we are to follow -- you are to follow what the
25 law is as established and as reflected in the plain language of

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1 the Statute Section 73 and Section 71 of the Securities
2 Industry Act.

3 THE COURT: But if the court down there decided
4 contrary to what we think the plain language might be that in
5 fact the SCB was required to accept the liquidation, where
6 would that put us?

7 MR. O'ROURKE: Well, hypothetically, if that was
8 decided say, two years from now?

9 THE COURT: Yes, or tomorrow.

10 MR. O'ROURKE: We can't wait two years from now. We
11 have procedures here. That is the law down there now. Laws
12 can always change, but the application of the law or the plain
13 language of the law -- I don't think we need to look any
14 further since we have the plain language of the statute. But
15 it's -- if you want to look two years, three years down the
16 road, it can be a different statute. We don't wait for that.
17 The law is what it is. And assuming that the law down there
18 said you don't have to produce. Just assuming arguendo that
19 was the plain language. Your Honor could still order the
20 production and then the defendants have to make their choice.
21 Are they going to follow the law in a foreign country or are
22 they going to follow the law here? It's their choice to make.

23 THE COURT: Ordinarily I would go through the comity
24 analysis. It's your suggestion I don't have to go through that
25 analysis because there is no conflict.

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1 MR. O'ROURKE: There is no conflict -- there is a
2 conflict. It's between the defendants and their own country.
3 That's the conflict. Not between United States and United
4 States regulators and the Bahamian regulators, no conflict
5 whatsoever, your Honor. They've been cooperative. As you can
6 tell from the affidavit that was filed, they're not happy with
7 the conduct of the defendants in this case as well. So you
8 don't even get to the comity.

9 If you do, as we indicated in our brief, we've gone
10 through the elements and we've established those, I think. But
11 ultimately they have to make their choice or if your Honor
12 orders production are they going to follow your Honor's order
13 or not? And if they don't, there's consequences. And even if
14 the foreign law prohibited them, you still would go through the
15 comity analysis, and we believe that we would meet that, but it
16 would still be up to them to make their choice. If they don't
17 want to comply with the laws here, that's their choice, but
18 then there are very definite consequences if they don't produce
19 the documents if your Honor orders them to produce, and they
20 have no basis for refusing to produce those documents.

21 They say they are in limbo. They're in a Catch-22.
22 They're not in limbo. They're not in a Catch 22. They can't
23 even get to first base with their argument. They're not in
24 limbo. They're a registered broker-dealer in the Bahamas.
25 That's not limbo, your Honor.

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1 Then they said we've received documents requesting
2 some from the Securities Commission of the Bahamas. We pointed
3 that out. It's in our brief. We did obtain certain limited
4 documents, but they make clear that there's a lot more that
5 they're not producing, and they identify those in their initial
6 disclosures, their original initial disclosures and the amended
7 initial disclosures.

8 Obviously, if your Honor has any other questions, but
9 we do respectfully submit that we have shown that they should
10 be ordered to produce the documents. They haven't met the
11 burden, and we request your Honor order them to produce all the
12 documents related to U.S. customers by no later than April 24.

13 Judge Daniels said that it needed to be within 30 days
14 from this conference. I would think they could do it. We've
15 identified them all. They've isolated them at the warehouse.
16 They could do it within 15 days, but Judge Daniels said they
17 have to do it within 30 days or whatever your Honor orders.

18 So we would request that they be ordered to produce
19 all such documents. I would also ask for an order if there is
20 any loss or destruction of documents that they explain that at
21 the same time.

22 Your Honor, otherwise we rely on the brief.

23 THE COURT: Thank you, Mr. Patterson.

24 MR. PATTERSON: Can I briefly respond, your Honor?
25 Mr. O'Rourke just said we can't wait two years for a resolution

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1 down in the Bahamas. The fact is Gibraltar and Davis are in
2 year five of dual SEC investigations. They previously produced
3 documents requested by the SEC in 2010. The SEC could have
4 asked for these documents then. We're three years removed from
5 the Magnum d'Or action. The Magnum d'Or action in Florida was
6 an alleged pump-and-dump, the exact same alleged perpetrators,
7 the exact same trading is what is at issue in their claim in
8 this case. They could have subpoenaed documents from Gibraltar
9 as part of that action. They could have named Gibraltar and
10 Davis as part of that action. So three years before filing
11 these actions to now complain about the delay, frankly, your
12 Honor the delay is not the fault of Gibraltar.

13 Mr. O'Rourke also made much of this affidavit he
14 handed me a half hour ago from this lady in the Bahamas. I
15 would point out, as your Honor pointed out with respect to
16 Mr. Rigby, she has a stake in this. She is objective. She is
17 with the defendants in the action down in the Bahamas.

18 Mr. O'Rourke also referred to *Renert*. *Renert* I think
19 is very, very distinguishable, first and foremost, because in
20 that case there was actually an opinion from the Bahamas
21 Supreme Court on the status of the receivership. That is not
22 the case here. That is what actually Gibraltar is fighting for
23 down in the Bahamas.

24 THE COURT: But in order to establish foreign law, you
25 don't need a decision in the same case with respect to the

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1 application of law, do you?

2 MR. PATTERSON: No, you don't, your Honor, but the
3 point is that it is not analogous, in particular because of the
4 confidentiality argument that the defendant advancing. He was
5 arguing confidentiality under the Bahamian Constitution, a
6 Bahamian Mutual Fund Act, and the Bahamian Trust Act. We
7 haven't argued confidentiality under any of those laws down in
8 the Bahamas.

9 What we're arguing is more fundamental, which is
10 simply lack of possession, custody and control. We're also
11 arguing confidentiality. We were advised by Bahamian counsel
12 that if Davis or Gibraltar turn over their confidential client
13 documents, they subject themselves to liability in the Bahamas.

14 We raised this to the SEC a year and a half ago and
15 said an international request would most likely, we understand
16 from Bahamian counsel, solve this problem. Mr. O'Rourke makes
17 light of *Tournier*. Admittedly, it is an old case but it is a
18 good case. I actually just wanted to read you one sentence
19 from *Parry-Jones* case, which Mr. O'Rourke also did not find
20 persuasive. He dismissed it as involving a solicitor. In
21 fact, there were two privileges at issue in that case. There
22 was essentially an attorney-client privilege. I quote, and
23 this is from *Parry-Jones* case, ECF filing document 47. The
24 second privilege arises out of confidence subsisting between
25 solicitor and client similar to the confidence which applies

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1 between doctor and patient, banker and customer, accountant and
2 client and the like. The law implies a term into the contract
3 whereby a professional man is to keep his client's affairs
4 secret and not to disclose them to anyone without just cause.

5 See *Tournier v. National Provincial and Union Bank .*"

6 We are advised by Bahamian counsel that these are
7 relevant authorities. They are not as controlling as the
8 highest court in England, but they are relevant authority, and
9 we cite them because, frankly, if you Google *Tournier*, your
10 Honor, you'll find lots of articles written by large New York
11 law firms about how *Tournier* is still good law. These cases
12 show that it doesn't just specifically apply to bankers. It is
13 a professional duty of confidentiality that professionals owe
14 to their client. And that's a consideration and a serious
15 consideration for Davis and Gibraltar.

16 THE COURT: Aren't Davis and Gibraltar fully protected
17 if their disclosure is pursuant to court order?

18 MR. PATTERSON: I believe this is actually in
19 Mr. Rigby's affidavit, but I know he has told me multiple times
20 they are only protected if it is an order from a Bahamian
21 court. With all due respect, I have the ultimate most respect
22 for your Honor in the Southern District, but apparently you
23 need a Bahamian court to get protection against violating
24 client confidentiality down in the Bahamas, and, again, the
25 international request process would have produced that result.

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1 And had they pursued it a year and a half ago, I think we would
2 be at that point right now.

3 Just quickly, on the last point, your Honor, is on the
4 comity issue if your Honor does indeed find a conflict of laws.
5 I was just re-reading the comity analysis last night, and it
6 struck me that the first factor mentioned is the importance of
7 the documents. It's one of the factors. I believe it is the
8 first mentioned.

9 Back in August of 2013, Mr. O'Rourke's predecessor at
10 the D.C. office wrote a letter to Judge Daniels opposing our
11 request to consolidate these two SEC actions. We quoted I
12 believe in our reply brief, he wrote that the SEC, the D.C.
13 office is prepared to move for summary judgment. This was back
14 in August of 2013. The only reason they're not moving for
15 summary judgment is because Warren Davis should be offered an
16 opportunity to testify on his own behalf. That was a year and
17 a half ago, they said they were ready to move for summary
18 judgment.

19 Even more recently, the SEC's D.C. office recently
20 served deposition notices on Davis and Gibraltar. The dates
21 they noticed, I believe, were February 25 and February 26 of
22 last month. So, clearly, they were prepared to depose Davis
23 and Gibraltar before they even had a resolution on this
24 document issue, much less have the documents. So, on that
25 first comity factor, the SEC seems to have made it abundantly

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1 clear that these documents are not particularly important to
2 proving their case.

3 I have nothing further, your Honor.

4 THE COURT: One last question before I hear from Mr.
5 O'Rourke. What about the coincidence of the filing for the
6 resolution bringing the company into liquidation the day after
7 the day after the receipt of the Wells letter?

8 MR. PATTERSON: I can't speak to that, your Honor,
9 except I would assume that that Wells notice did not come out
10 of the blue, but particularly given that Gibraltar was
11 investigated and produced documents starting in 2010, I have to
12 believe that they had -- that they were well aware that this
13 potential was on the horizon.

14 THE COURT: I'm sure they were aware of the potential,
15 but it brings focus when you actually get a Wells notice.

16 MR. PATTERSON: I believe we told the SEC during the
17 Wells process that Gibraltar was in the process of shutting
18 down. There was also an issue regarding their website, and
19 whether that was a solicitation and they had taken down their
20 website, we've made those points in the Wells submission. As
21 far as I know, it is purely coincidence. I have no
22 information, again, that this was a game of strategy to try
23 and get ahead of this issue.

24 THE COURT: Thank you.

25 MR. O'ROURKE: The Wells submission was a couple of

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1 months later. They included it in their reference to close it
2 down. It was August 28, and the Wells letter, I mentioned
3 earlier, that was December that came in.

4 A few points in response, your Honor. I'm not even
5 sure you need it, but the argument that we optimistically said
6 we expect to get summary judgment, we remain eternally
7 optimistic that we will get summary judgment. Nevertheless, in
8 spite of our eternal optimism, sometimes judges disagree with
9 us and we need to get discovery that we need and that we're
10 entitled to, first to buttress our summary judgment arguments,
11 and hopefully we won't get to this, in case we have to go to
12 trial, we need those documents regardless of our stated
13 optimism about summary judgment, and we're entitled to them,
14 and they haven't met their burden.

15 I also would note that in their motion to dismiss
16 before Judge Daniels, the two defendants or counsel made the
17 point over and over that the SEC can't point to a single
18 customer that used the website -- that was solicited by their
19 website, a key issue in the case. We can't point to a single
20 customer. Well, who has the records of their customers that
21 they won't produce? Who has the communication with all their
22 customers? The emails with those customers. There was a
23 customer writing in that said, "I saw -- I liked your website,"
24 whatever it might have been said, just as examples of points
25 that are relevant and then they point to us to not being able

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1 to point to a single customer because they're hiding all that
2 information. They're trying to have their cake and eat it too,
3 your Honor, and that's inappropriate. They should be producing
4 all the documents that concern their U.S. customers; not the
5 non-U.S. customers, but the U.S. customers. They've identified
6 all those documents. They're in the warehouse, they say. They
7 identify them in their initial disclosures, and that portion of
8 them that relates to the U.S. customers, we need access to. At
9 a minimum, if they ordered to produce them and they don't, at a
10 minimum, there should be a preclusion argument that that we
11 can't point to a single customer if they keep all the
12 information hidden.

13 He referenced the sworn affidavit that we only got
14 yesterday afternoon before I got on the train. I read it on
15 the train coming up last night. I would note that it is a
16 sworn affidavit. Rigby's affidavit or declaration, as it may
17 be, is not sworn. The affidavit we're submitting is sworn, and
18 the affidavit from the executive director of the Securities
19 Commission in the Bahamas says that they had to have
20 authorization of the SCB in order to go into liquidation; and
21 to put it mildly, it is inappropriate -- or it's wrong, I
22 should use a different word, for them not to have obtained such
23 authorization.

24 Finally, *Renert*, he referred to all the mutual fund
25 provisions at issue in *Renert* that aren't at issue here, he's

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1 correct, but ultimately he left out the argument about
2 commonlaw, confidentiality was at issue in *Renert* and was
3 rejected.

4 I have nothing further, unless your Honor has any
5 questions.

6 THE COURT: Thank you.

7 MR. O'ROURKE: Nothing further on that, as we still
8 have to decide this issue.

9 THE COURT: Why don't we start with that.

10 MR. BRODY: Your Honor, if I may, for purposes of the
11 motion that is at issue, our second discovery request in the
12 Carrillo Heuttel to Gibraltar and to Davis, the objections that
13 they made with respect to our request are the same issues that
14 are at issue in the Gibraltar case which we have been
15 discussing here. So to the extent your Honor rules on those,
16 we would request that the order comprise both with respect to
17 the documents sought in Gibraltar case and Carrillo Heuttel.

18 THE COURT: Well, in the absence of any application
19 other than what you've just made, I doubt that it will
20 encompass it.

21 MR. BRODY: I may be incorrect, but I thought that the
22 first papers that were submitted said to your Honor that it
23 also included -- that the issues were also the same.

24 THE COURT: I'm not sure it's going to make any
25 difference because it's going to bind everybody in any event.

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1 MR. BRODY: Right, footnote three in our memorandum
2 law firm raised that issue.

3 THE COURT: Mr. Patterson, do you want to talk to the
4 site of the deposition?

5 MR. PATTERSON: I do, your Honor. Gibraltar is, was,
6 a Bahamian corporation office in Nassau, Bahamas. It's never
7 had an office in the U.S. Davis is a Bahamian resident, a
8 Bahamian citizen. He's never lived in the U.S. He's never had
9 a business interest or office in the U.S. or anything like
10 that.

11 As we all know, the general rule is that parties are
12 supposed to be deposed where they are located. In this case,
13 Davis and Gibraltar are located in the Bahamas, which is a
14 two-hour plane flight away. It's the same time zone. The SEC
15 is supposed to put forth, I think the phrase is, peculiar
16 circumstances why Davis should be dragged up to New York for a
17 deposition.

18 First of all, I would like to be perfectly candid
19 here, your Honor. This investigation has been going on for
20 five years as to Gibraltar and Davis, and, frankly, your Honor,
21 resources to litigate and defend are becoming an issue. Also,
22 given the status of Gibraltar, which as we say is uncertain at
23 best, we advised the SEC last week that Gibraltar is simply not
24 in a position to put forth a 30(b)(6) witness regardless of
25 where the deposition takes place. On the advice of Bahamian

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1 counsel, there's no mechanism for it, there are no employees,
2 there's a lack of resources. Gibraltar would be able to unable
3 to build a 30(b)(6) witness, which is what they would have to
4 do. So, we told the SEC by letter last week that we are
5 withdrawing our proposed motion for protective order as to the
6 location of the deposition of Gibraltar, but we remain
7 completely convinced that the appropriate location for the
8 deposition of Davis individually is the Bahamas. Of course,
9 your Honor has seen the briefs. Really, I think what it boils
10 down to is the SEC is looking for the convenience of the SEC
11 itself. I took a poll informally of defense counsel for the
12 other parties. They have all advised they have no objection to
13 Davis being deposed in the Bahamas. We don't object. Of
14 course, that's our preference, and we believe that's
15 appropriate under the law. I know actually that the SEC New
16 York office sent out an email yesterday proposing dates to
17 depose defendants who are Canadian in Canada. I understand
18 they are also going to depose another defendant in California.
19 And I understand they're going to depose witnesses in Hong
20 Kong.

21 It seems to me if they are prepared to travel for
22 these depositions, and if there is no opposition from us, there
23 is no opposition from other defendants, the only party that
24 seems to want this deposition in New York is the SEC's D.C.
25 office, which under the general standards is not appropriate

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1 ray. Davis is Bahamian resident and citizen. There is no
2 reason to bring him up here. To be perfectly candid, and, in
3 fact, blunt, the other thing we did last week after much
4 consultation with our client, Mr. Davis, Mr. Davis directed us
5 to inform the SEC that when he is deposed, he will assert his
6 Fifth Amendment privilege in response to all questions having
7 to do with this action. So we said to the SEC, under the
8 circumstances, how about we give you a declaration or a
9 representation or a statement, whatever will satisfy you, to
10 that effect. That will be by far the most efficient,
11 convenient, economical resolution to this for everyone.

12 The response from the SEC New York office -- and,
13 frankly, I know that they have accepted similar arrangements
14 for other defendants in the Carrillo Heuttel case -- the
15 response from the SEC New York offices, they'll think about it
16 once the document issue is resolved. The response from D.C.
17 office was, no, Davis has to come here.

18 So really what they're arguing for right now is to
19 drag Davis up to New York away from his home, away from his
20 family, away from his attempts to earn some money now that his
21 business has been shut down, all so he can sit down for an hour
22 and a half and say "On the advice of counsel, I assert my Fifth
23 Amendment privilege." It is the least efficient, least
24 convenient, the least economic way of handling this. We
25 respectfully request the deposition of Davis should be ordered

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1 to take place in the Bahamas where he lives.

2 THE COURT: If resources an issue, isn't it more cost
3 effective for your client to come here than to pay for you to
4 go there?

5 MR. PATTERSON: One thing we proposed to the SEC is a
6 video deposition. I know in one of the opinions cited, I guess
7 it was *Mill Run*, the issue there was the defendant was
8 proposing a deposition by telephone. I think back then they
9 didn't have video conferencing. Today we have video
10 conferencing. Apparently, we have video conferencing
11 capabilities even in the Bahamas. If there is any dispute
12 during the course of the deposition and calls need to be made
13 to your Honor, to chambers, I speak with Mr. Davis frequently
14 by telephone. It is not an impediment. It is far more
15 economical.

16 Frankly, your Honor, I think with all due respect the
17 starting point is it's where the person's located. It's not
18 for the SEC to say, why shouldn't he come up here?
19 Particularly if he is going to assert his Fifth Amendment
20 privilege, it makes no sense to drag him here away from his
21 family, away from his home, and away from his attempts to earn
22 a living for the convenience of one of the SEC offices.

23 THE COURT: Suppose it were on the SEC's dime?

24 MR. PATTERSON: They've already proposed that, your
25 Honor. Frankly, I don't think it is fair and I don't think it

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1 is right under the law. To be perfectly blunt, your Honor, I
2 wonder whether the SEC has ulterior motives. I wonder whether
3 they are hoping that your Honor will order the deposition to
4 take place in New York, and then they are going to keep their
5 fingers crossed and hope that Warren Davis doesn't show up and
6 then they can move for default as a sanction for failing to
7 attend the deposition.

8 You have to bear in mind that Warren Davis --
9 Mr. O'Rourke referred to him as a bank robber, I believe a few
10 moments ago. In the New York action, some of the claims were
11 10b-5 against Gibraltar and Davis. We moved to dismiss. Judge
12 Daniels agreed with our arguments, and they amended. The only
13 fraud claim pending against the defendants now is a 17A
14 negligence standard claim, but the fact remains that they have
15 been investigated and charged by the SEC with securities law
16 violations.

17 I just can't help but wonder, and I know your Honor
18 mentioned this in the *Mill Run* opinion, I believe it was, that
19 it would be inappropriate to order someone into the U.S. for a
20 deposition as a means of apprehending him. I don't know if
21 that is what's going on here, but the fact that by far the most
22 convenient way of doing this would be by affidavit or even by
23 video from the Bahamas because he is just going to assert his
24 Fifth Amendment privilege. The cynic in me can't help but
25 wonder whether the SEC has an ulterior motive or they hope he

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1 doesn't show and they can move for a default.

2 MR. O'ROURKE: I can answer that, your Honor.

3 THE COURT: Are you done?

4 MR. PATTERSON: Yes, I am.

5 THE COURT: Go ahead.

6 MR. O'ROURKE: I thought he had been finished. I'm
7 sorry. But we have no intent to apprehend him.

8 We do have intent to take his deposition. It would be
9 videotaped. He and Gibraltar are the only defendants in our
10 case when we go to trial. I need his deposition. I need him
11 answering on the record. We're entitled. It's standard
12 procedure. The New York case, Carrillo has many defendants. I
13 can't speak to that case. I'm speaking to our need. And their
14 application for a protective order never said anything about
15 the Fifth Amendment, by the way. If they had, they told us
16 either Wednesday or Thursday in cryptic language he's going to
17 take the Fifth Amendment. They implied he wouldn't even be
18 coming. They implied it. I didn't say it. He is now
19 saying -- I guess he's saying that he will come. So it's a
20 two-hour flight. We have not just offered to pay it. We are
21 going to reimburse him. I can't promise first class tickets,
22 but we will reimburse him at the government rates and per diem
23 and hotel. It's two hours away.

24 He talks about Mr. Davis trying to earn a living.
25 Your Honor, they never submitted a declaration from Mr. Davis

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1 that he's now in X business and he's doing this and he can't
2 get away. That is the first time I even heard that he's trying
3 to earn a living. No proof of that, no proof at all, no
4 declaration that he can't get away. So we don't need to give
5 that any attention. And the advice of Bahamian counsel --
6 30(b)(6) is a rule applicable in this court. It's not the a
7 rule for Bahamian counsel to interpret, but they say they're
8 not going to show up. I don't think it is right to withdraw a
9 motion when the motion is ready to be presented to be argued.

10 So I think the appropriate thing is to get an order
11 requiring Gibraltar to attend the deposition in New York under
12 30(b)(6). It's not like there's no basis. Mr. Davis is the
13 president, the sole owner. He was, as indicated in the
14 recently filed affidavit, he was the one that attempted after
15 getting the Wells notice to put it into liquidation without
16 going through the appropriate route. He's the one who controls
17 it, so he could be a 30(b)(6) witness.

18 Indeed, he is not going to take the Fifth. That's why
19 we need him up here. He can't take the Fifth as to everything.
20 There were certain admissions in their answers to the
21 complaint. He is not going to be able to take the Fifth on
22 that. If he does, we need your Honor nearby for rulings on
23 that because the same analysis applies. At any rate, Gibraltar
24 should be ordered to attend. I don't think the motion can be
25 withdrawn at the last minute. To be sure, sanctions are

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1 applicable if Gibraltar doesn't the attend under 37(d). I
2 think an order at this stage since the protective order was
3 filed would still be appropriate as to Gibraltar.

4 With respect to the requirements concerning the
5 location of the deposition, I don't need to tell your Honor,
6 you wrote the seminal opinion in *Mill Run* in this whole area.
7 Every case cites your Honor's opinion in *Mill Run*. As pointed
8 out there, the normal presumption that they refer to doesn't
9 apply reply here, because we couldn't sue him in the Bahamas.
10 If we could, we would be required to go where he lives, but
11 we're the United States Securities Commission. We can only
12 file suit in the United States. So the Bahamas -- the normal
13 presumption simply doesn't apply here. This is where the case
14 is pending. It's a two-hour flight away. The convenience of
15 counsel still favors New York.

16 Assuming he took an accurate poll, although I think
17 there is more to that statement about the poll. We have still
18 have SEC New York counsel that wants to ask questions. We have
19 the Washington counsel who is train ride away. We have
20 Mr. Patterson and Mr. DeFeis. So the convenience of counsel
21 still favors it. All he's got to do is get on a plane, he will
22 be reimbursed, get up here and give us his deposition. Again,
23 no affidavit has been submitted or any kind of hardship on
24 Davis's business.

25 Your Honor has seen certain acrimony between counsel

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1 in this case as a result of all the serial excuses that
2 continues today when I focused on August 29 as a result of this
3 affidavit, and as a matter of fact the Wells notice was given
4 the day before. Their initial disclosures, the original one
5 and the amended never referred to August 29th. It was only the
6 Rigby declaration that finally referred to it, and it was that
7 declaration from the executive director in the Bahamas that
8 caused them to be concerned because they hadn't been provided
9 with any information.

10 Again, even if he is going to assert the Fifth, he can
11 do it, but we are entitled to contest that, to ask appropriate
12 pointed questions for use at trial, and we may very well need
13 the Court's availability. We didn't have time to submit a
14 brief because they didn't submit a brief using that as an
15 argument, but I did yesterday quickly look -- and I know there
16 was a case before Judge Duffy years ago. He ordered the
17 witness to show up for a question-by-question assertion of the
18 Fifth. They took him up to the Second Circuit and it was
19 quickly reversed, and they had to do it again. I found *U.S. v.*
20 *Malnik*, 489 F. 2d, 682, 685 (5th Cir. 1974). Witness is
21 required to appear and assert privilege on a
22 question-by-question basis. That is what's appropriate here.
23 That is what's required here. It may be more convenient for
24 him just to stay down in the Bahamas, but I think we're
25 entitled to it. We made a proper showing as to the appropriate

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1 site of the deposition in our submission. And we will ask
2 pointed questions about the admissions in both Mr. Davis's and
3 Gibraltar's answer to the complaint.

4 So, as a remedy, we would ask if your Honor agrees
5 with our opinion, for an order for defendants to attend their
6 depositions in New York at the time. It was either 9:00 or
7 9:30, whatever was in our previous notice, and at our New York
8 location, our New York office, on a set date. And we would
9 recommend, if your Honor orders documents, and when that is,
10 but if it is approaching 30 days, May 11 for Warren Davis and
11 May 12 for Rule 30(b)(6) witness, and if additional time is
12 required, to continue on the 13th. I note Judge Daniels has a
13 conference in the case on May 14. That is why the Monday,
14 Tuesday and if necessary Wednesday, why I am proposing those
15 dates and that that be included. And if not those dates, if
16 your Honor wants to put in any dates, we could all be there on
17 those dates. If he has a problem, I would ask him to propose
18 alternative dates before we leave so we don't have any further
19 disagreement. Thank you, your Honor.

20 MR. PATTERSON: I can't propose any dates without
21 speaking to my client.

22 I just wanted out to point Mr. O'Rourke referred to
23 *Mill Run* and the convenience of the attorneys. I think it's
24 worth noting in your Honor's opinion in *Mill Run*, you note that
25 what is most important is the convenience of the parties. The

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1 convenience of the attorneys comes after that. It is
2 subordinate.

3 Mr. O'Rourke said they should be entitled to ask
4 pointed point-by-point questions of Warren Davis. Fine. They
5 can do that in the Bahamas where he lives and where he has his
6 citizenship.

7 To be perfectly blunt, your Honor it seems to me to be
8 manifestly unfair that Davis is defending two separate actions
9 in their fifth year by two separate offices. Discovery is
10 supposed to be coordinated or consolidated. The New York
11 office apparently is prepared to go to Canada to depose
12 defendants, which would implicate all the concerns over foreign
13 law that Mr. O'Rourke is mentioning in theory. That's what
14 those are. Those are hypothetical theoretical problems.

15 So if one office is prepared to go to Canada, they are
16 prepared to go to California, which is actually a longer flight
17 than the Bahamas, they're prepared to go to Hong Kong for
18 witness. It seems to be completely unfair that Gibraltar, I
19 think, frankly, for the convenience of the SEC attorneys -- or
20 Davis for the convenience of the SEC attorneys should be hauled
21 up to New York. I don't understand why they get different
22 treatment of individual party defendants in different cases.

23 It seems to me that if the SEC is doing Hague
24 Convention requests and is doing depositions in Canada on the
25 other case, there's no reason why they can't do them here. I'm

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1 drifting back into the documents, but particularly when we
2 first raised these issues a year and a half ago, as far as the
3 acrimony in this litigation, it is not coming from us. For a
4 year and a half we have been proposing solutions and
5 workarounds. It's our position that the default under the law
6 is he should be deposed where he is. I don't think, frankly,
7 the convenience of the lawyers or the SEC lawyer should be
8 determinative and should be what tips it in favor of dragging
9 Warren Davis away from his home, away from his country up to
10 New York. It's our position that it should be in the Bahamas.

11 Mr. O'Rourke mentioned he didn't brief this, although
12 I think we did brief it orally today, but if it would be
13 helpful for your Honor to seek further submissions, we'd be
14 happy to do that, although as I mentioned, the defendants are
15 really having to pick and choose their battles at this point
16 because their resources are being drained by this litigation.
17 I would respectfully request that it be done in letter form
18 rather than in the form of a formal motion.

19 Nothing further, your Honor.

20 MR. O'ROURKE: If I may, just briefly, your Honor,
21 Judge Daniels ordered that any briefing was to be done before
22 today's appearance. So if they are going to brief it on the
23 Fifth Amendment, that should have been submitted in a brief
24 before. Mr. Patterson was there when Judge Daniels ordered
25 that and had a chance to speak to it and he didn't. That was

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1 the order. He's had his opportunity.

2 He raised a point I would just like to respond about
3 this year and a half begging us to go and use alternative
4 maintenance. The fact of the matter is we begged them to show
5 us the basis for them withholding the documents. When they
6 referred to the Bank and Trust Act. We showed them that the
7 Bank and Trust Act didn't apply to broker-dealers. We showed
8 them when they mentioned the liquidation that SCB approval for
9 liquidation was required, and that they didn't have it. We
10 told them that. They're the ones that raised points and we had
11 to educate them each time. We showed them that registration
12 surrender was subject to SCB rejection when they raised that.
13 We showed them the plain language of the Securities & Exchange
14 Commission Act -- Securities Industries Act and we didn't need
15 more. They raised a point, and we answered and educated them,
16 but they still largely stuck by their points, your Honor.

17 And all along during the year and a half in
18 innumerable letters that we've asked them for the production of
19 all their document concerning their United States customers,
20 when are they coming? When are they coming? And they never
21 produced them. We said you need to file for a protective
22 other. And they never did. They never did. Finally, after
23 waiting, as your Honor knows, I filed a premotion on the issue
24 and your Honor ordered them to -- or set the schedule and then
25 they filed a motion for protective order. We weren't sitting

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1 on anything for a year and a half. We were trying to get them
2 to do their duty by pointing out the law to them, but they
3 continued to stand by it even though the plain language
4 indicated they had not basis.

5 Thank you, your Honor, for your time.

6 THE COURT: I'll reserve on those applications.

7 Let's turn briefly to Carrillo. My understanding is
8 we have three issues outstanding. We have SEC's motion to
9 compel that it is going to be fully submitted the day after
10 tomorrow. We have the Hague Convention letters request
11 application. And we have what I think originally what started
12 as the government's application with respect to the location
13 and the matter of taking the depositions. And we have
14 Mr. Kirk's application for protective order that was made
15 yesterday.

16 Am I correct about where we are on those things?

17 MR. BRODY: Yes, your Honor. I don't think that the
18 first two issues really need any discussion because we are
19 going to brief the issue or the issue with respect to the
20 briefing on the motion to compel, that will be completed by
21 Friday, although I will note that none of the officers or
22 directors of either Pacific Blue Trademark -- Pacific Blue
23 Trade Show or Skymark have opposed our motion. I guess there
24 are two oppositions, but none of them are by the people who we
25 think are privilege holders. But we will finish our briefing

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1 on Friday. I don't know if anyone is going to propose the
2 Hague Convention request. We request that those be granted.

3 I guess the bigger issue, an issue I am hoping we can
4 receive some clarity on today is the third issue. We have
5 depositions that are presently scheduled to take place tomorrow
6 and on Friday in Alberta and Vancouver respectively, and then
7 on Tuesday in Hong Kong. So, the SEC has set up the
8 depositions in a manner where the SEC and whichever lawyers
9 want to be present at the SEC offices in New York can do
10 deposition by video, and any defendant who wants to personally
11 attend those depositions can travel and attend those
12 depositions in the locus of Albert, Vancouver or Hong Kong.

13 THE COURT: I guess I am not inviting argument on that
14 because we don't have Mr. Kirk's counsel here.

15 MR. BRODY: The problem is though that Mr. Kirk's
16 counsel filed a motion for protective order yesterday, and the
17 deposition was supposed to start tomorrow.

18 THE COURT: Frankly, I am just assuming that your
19 initial letter is your response to their application. So I
20 don't know that there is anything else I need on this.

21 MR. BRODY: Well, Mr. Kirk's counsel does raise the
22 issue with respect to us paying for the cost of the deposition
23 under S.D.N.Y. Local Rule 30.1. We want to have the
24 opportunity to brief that issue, which is kind of separate from
25 the other issue. What I propose to your Honor is that there is

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1 what I believe to be a Solomonic way of resolving this dispute
2 where all of the parties' interests can be addressed. I would
3 just like to briefly state that to your Honor. In fact, I
4 raised this issue with Mr. Kirk's counsel, but he doesn't
5 address it in his motion for protective order.

6 THE COURT: I guess I don't want to hear it unless
7 Mr. Kirk's counsel is here. If you want to put it in writing
8 and copy him, that's fine. If you and he come to an agreement
9 with respect to this solution, that's fine as well. I just
10 don't want to be in a position where I'm taking a one-sided
11 argument.

12 MR. BRODY: I understand, your Honor. To some
13 respect, if you are going to file a motion for protective order
14 with respect to a deposition that is going to take place in two
15 days, and you know that there is a conference the next day, you
16 should be sending someone to that conference. That is my view
17 of it.

18 THE COURT: I understand. Put it in writing, copy
19 him, and we'll have it taken care of.

20 MR. BRODY: Thank you. I'm hoping that that
21 resolution which we will send to you in our letter would
22 hopefully resolve the issues.

23 THE COURT: That would be great.

24 MR. BRODY: Thank you. I send that to your Honor
25 within the next hour and a half, I hope.

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1 THE COURT: Very good. Thank you all. (Adjourned)

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